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U.S. BANKRUPTCY COURT
MDNC - AHH

ORDER

The motion seeks dismissal of this case pursuant to § 707(b) of the Bankruptcy Code. Under § 707(b) the court "may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds the granting of relief would be a substantial abuse of the provisions of this chapter." This provision represents an attempt to strike a balance between allowing debtors a fresh start and stemming abuse of consumer credit by providing the bankruptcy court with a means of dealing equitably with the situation in which a debtor seeks to take unfair advantage of his or her creditors through the use of Chapter 7. See In re Green, 934 F.2d 568, 570 (4th Cir. 1991). Section 707(b) should be applied in a manner in which a truly needy debtor is allowed a fresh start, while denying a head start to the abusers. See In re Rodriguez, 228 B.R. 601, 603 (Bankr. W.D. Va. 1999).

However, under § 707(b) a debtor who files a Chapter 7 case automatically has the benefit of a presumption in favor of granting the relief requested by the debtor.

There are two requirements in order for § 707(b) to be applicable: the debts in the case must be primarily consumer debts and it must be shown that granting the debtor a Chapter 7 discharge would involve a "substantial abuse" of the provisions of Chapter 7. In the present case, it is undisputed that the debts are primarily consumer debts.¹ Hence, the only issue for determination is whether granting the Debtor a Chapter 7 discharge would involve a substantial abuse of the provisions of Chapter 7.

There is no statutory definition of "substantial abuse" to aid in this determination. Various tests or rules have been developed by the courts. However, the rule most cited in the Fourth Circuit is the one adopted in In re Green. In Green, the court declined to adopt a per se rule under which a debtor's ability to pay his or her debts, standing alone, justifies a § 707(b) dismissal. See id. at 572. Instead, while specifically recognizing that the debtor's ability to pay is the primary factor to be considered, the court ruled that "the substantial abuse determination must be made on a

¹Under § 101(8) of the Bankruptcy Code a consumer debt is a "debt incurred by an individual primarily for a personal, family, or household purpose." A debt "not incurred with a profit motive or in connection with a business transaction" is considered consumer debt for purposes of § 707(b). See In re Kestell, 99 F.3d 146, 149 (4th Cir. 1996).

case-by-case basis, in light of the totality of the circumstances." Id. at 572-73. The court then provided the following examples of the circumstances or factors to be considered: (1) whether the bankruptcy petition was filed because of sudden illness, calamity, disability or unemployment (2) whether the debtor incurred consumer credit in excess of his or her ability to pay; (3) whether the debtor's family budget is excessive or unreasonable; (4) whether the schedules and statement of financial affairs reasonably and accurately reflect the debtor's true financial condition; (5) the debtor's ability to pay; and (6) whether the petition was filed in good faith. See id. at 572. Having considered these and the other circumstances involved in the present case, the court has concluded that the granting of a Chapter 7 discharge in this case would involve a substantial abuse of Chapter 7 and that the motion to dismiss therefore should be granted.

The Debtor has had significant, stable income over a period of many years preceding the filing of this case. The Debtor's stream of income has been steady and uninterrupted and this case was not filed as a result of sudden illness, calamity, disability or unemployment. Both of Debtor's children are over thirty years of age and have not depended upon the Debtor for support for a number of years. Nevertheless, the Debtor maintains that she was unable to pay the consumer debt which she had incurred prior to the filing of this case. Although some factors weigh in favor of the Debtor,

the Debtor's strong ability to pay her creditors weighs heavily against the Debtor receiving Chapter 7 relief and tips the § 707(b) scales against her.

Making an analysis of a debtor's ability to pay under § 707(b) involves examining the debtor's future income and future expenses. See id. (exploring "the relation of the debtor's future income to his future necessary expenses" is part of § 707(b) analysis); In re Krohn, 886 F.2d 123, 126 (6th Cir. 1989); Waites v. Braley, 110 B.R. 211, 214-15 (E.D. Va. 1990). This is particularly true where, as in the present case, a debtor has stable income. The ability of a debtor to repay his or her creditors generally is measured by "assessing how much disposable income a debtor would be able to pay his or her unsecured creditors under a three to five year Chapter 13 plan." In re DeRosear, 265 B.R. 196, 203-04 (Bankr. S.D. Iowa 2001). A debtor's disposable income is determined in accordance with the definition contained in § 1325(b)(2) of the Bankruptcy Code using income and expense figures that are reasonable and accurate. See id. at 204. In deciding what income figures to use, it is appropriate for the court to consider whether the expenses claimed by the debtor can be "reduced significantly without depriving the debtor of adequate food, clothing, shelter and other necessities of life." In re Engskow, 247 B.R. 314, 317 (Bankr. M.D. Fla. 2000). Many courts base the ability to pay determination upon the percentage of

unsecured debt that could be repaid by the debtor in a Chapter 13 case, although the percentages regarded as reflecting an ability to pay have varied from case to case. See In re Norris, 225 B.R. 329, 332 (Bankr. E.D. Va. 1998). However, "the essential inquiry remains whether the debtor's ability to repay creditors with future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial abuse." In re DeRosear, 265 B.R. at 204 (citing Fonder v. United States, 974 F.2d 996, 999 (8th Cir. 1992)).

When this Chapter 7 case was filed the Debtor listed unsecured indebtedness of \$37,255.00, consisting primarily of credit card indebtedness. All or nearly all of that indebtedness was incurred by the Debtor prior to her marriage to her present, non-filing spouse. That marriage occurred in December of 2003. Debtor and her spouse live together in a residence owned by the spouse in Browns Summit, North Carolina. The Debtor and her spouse are both employed full time by a manufacturing firm located approximately six miles from where they live, and have been so employed for several years without interruption. In her Schedule I, the Debtor listed gross income of \$3,996.00 per month for herself and \$4,100.00 per month for her spouse and total net income of \$5,063.00 per month, consisting of her net monthly income of \$2,763.00 and \$2,300.00 per month of net income for her spouse. In her Schedule J, the Debtor listed current monthly expenditures of \$3,541.00, which includes the living expenses of both the Debtor

and her spouse and \$342.00 per month for the non-filing spouse's debt service.

The Debtor acknowledges that if the income of both spouses is included, there is sufficient disposable income to pay all of her debts through monthly payments over a period of thirty-six months or less. However, Debtor contends that her spouse's income should not be considered in determining whether she has the ability to pay her debts since the debts were incurred prior to her marriage. In that regard, Debtor's Schedule I has a notation stating that "Debtor incurred the debt prior to her marriage to Mr. Collins, and he is not responsible for the debt and will not contribute to any repayment plan." The issue thus presented is whether the income of the Debtor's non-filing spouse should be considered in determining whether the Debtor has the ability to repay her creditors for purposes of the motion to dismiss pursuant to § 707(b). The court has concluded that this issue should be answered in the affirmative.

The analysis in this case will begin with the observation that this is a case in which none of the debt listed in the schedules was incurred during Debtor's marriage to the non-filing spouse. The situation thus is one in which the non-filing spouse is not liable for any of the debt sought to be discharged. Moreover, since the debt was incurred prior to the marriage, the creditors could not have relied upon the non-filing spouse's ability or

willingness to be responsible for the debt. Nevertheless, the court is satisfied that the spouse's income must be considered in evaluating whether the Debtor has the ability to repay her debts. See In re Falke, 284 B.R. 133, 138-39 (Bankr. D. Or. 2002); In re Staub, 256 B.R. 567, 571 (Bankr. M.D. Pa. 2000); In re Engskow, 247 B.R. at 317; In re Wilkinson, 168 B.R. 626, 628-29 (Bankr. N.D. Ohio 1994). At a minimum, the income of the non-filing spouse is relevant to the court's evaluation of how much of the Debtor's income is required for her support because, in calculating whether there is disposable income available to fund a Chapter 13 plan, it is appropriate for the court to consider the degree to which a debtor's daily living expenses are shared as co-obligations of the non-filing spouse or are assumed completely by the spouse.

In the present case, the Debtor does not rely upon her income alone to pay for the family expenses listed in her Schedule J. Instead, it is undisputed that her spouse regularly pays his share of the family's expenses from his income, as well as his individual debts. Therefore, in determining the amount of the Debtor's disposable income, it is appropriate, at a minimum, to apply the spouse's income to one half of the joint expenses as well as to those expenses which are his alone. See In re Reese, 236 B.R. 371, 375-76 (Bankr. N.D. Ohio 1999). In the present case, this calculation has the effect of reducing the expenses listed on Schedule J from \$3,541.00 to \$1,599.50. This figure of \$1,599.50

represents the expense figure which should be utilized in the present case in determining the amount of the Debtor's disposable income.

Turning to Debtor's income, her Schedule I reflects net income of \$2,763.00 for the Debtor. However, in arriving at this figure, Debtor deducted from her monthly gross income the sum of \$145.00 which apparently is being withheld for her 401(k) contribution and as a payment on a 401(k) loan which Debtor obtained at some point before this case was filed. Such voluntary contributions are not reasonably necessary for the support and maintenance of a debtor or dependents of a debtor and in the context of a § 707(b) determination should be treated as disposable, available income for purposes of evaluating whether the debtor has the ability to repay her creditors. See In re Taylor, 212 F.3d 395, 397 (8th Cir. 2000); In re Anes, 195 F.3d 177, 180-81 (3d Cir. 1999); In re Heffernan, 242 B.R. 812, 818 (Bankr. D. Conn. 1999); In re Johnson, 241 B.R. 394, 399-401 (Bankr. E.D. Tex. 1999). This means that the Debtor's net monthly income is \$2,908.00 per month for purposes of determining the amount of her disposable income. Using that figure and the previously discussed adjusted expense figure of \$1,599.50, the court finds that the Debtor has disposable income of \$1,308.50 for purposes of making the § 707(b) determination of Debtor's ability to repay her creditors. This means that over a period of 36 months, the Debtor has the ability to pay a total of \$47,106.00

pursuant to a hypothetical Chapter 13 plan. There are no taxes or other priority debts in this case. The Debtor did list one secured creditor who apparently has foreclosed on a deed of trust on a condominium that Debtor purchased several years ago. While a deficiency is possible, the Debtor has never received any demand from the secured creditor or other indication that there is any unpaid deficiency indebtedness. Thus, even if 10% of the payments are deducted for Chapter 13 fees and expenses, it appears that a Chapter 13 Trustee would be left with \$42,395.40 for distribution to creditors which is more than enough to pay creditors in this case in full. This constitutes an ability to repay creditors which, under the totality of the circumstances of this case, is sufficient to render this case substantially abusive for purposes of § 707(b). The court reaches this conclusion without attributing any bad faith to the Debtor in filing this case and after taking into account the presumption in favor of granting relief under Chapter 7 and concluding that the evidence rebutted such presumption.

Now, therefore, it is ORDERED, ADJUDGED AND DECREED that the motion to dismiss pursuant to § 707(b) of the Bankruptcy Code is granted and this case shall be and hereby is dismissed.

This 31st day of March, 2004.



WILLIAM L. STOCKS
United States Bankruptcy Judge